LIBRARY
SUPREME COURT, U. S.

Supreme Court, U. S.
F I L E D
NOV 13
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of The United States

OCTOBER TERM, 1974

No. 74-104

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF OREGON

In Re:

Complaint as to the Conduct of
Charles O. Porter, Accused,

Petitioner.

OREGON STATE BAR
William F. Frye
835 East Park Street
Eugene, Oregon 97401
Counsel for Respondent

November 15, 1974

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF OREGON

To the Honorable, the Chief Justice and Associate Justices of the Supreme Court of the United States: Respondent Oregon State Bar prays that this Court deny the petition herein asking that a writ of certiorari issue to review the judgment of the Supreme Court of the State of Oregon entered in the above-entitled case on April 18, 1974.

QUESTIONS PRESENTED

There is really only a single question involved: Is there any contitutional infirmity in a rule affecting only lawyers as a class which prohibits them from making extra-judicial statements that are reasonably likely to interfere with the fair trial of a civil action, a more restrictive standard than imposed on lay persons?

Or, stated another way, is a rule of professional conduct which restrains a lawyer from making extrajudicial statements in conflict with the United States Constitution unless the statements rise to the level of a "clear and present danger to the fair and effective administration of justice," the standard applicable in criminal and contempt proceedings against non-lawyers?

STATEMENT OF THE CASE

Petitioner was charged by the Oregon State Bar

with violating Disciplinary Rule 7-107(F)* by making five separate statements to the news media concerning his investigation and litigation of a civil claim, which statements he reasonably could have expected to be communicated to the public by the media and which were so communicated. Specifically he was accused by the Bar of (1) making a statement relating to the character of the adverse party in the litigations; (2) twice making statements relating to evidence regarding the event involved in the pending civil matter; (3) making a statement in which he expressed his opinion as to the merits of the claim; and (4) making a statement on the eve of trial that the adverse party had offered a settlement which was not adequate.

* "A lawyer or law firm associated with a civil action may quote from or refer to public records, but shall not during its investigation or litigation make or participate in making an extrajudicial statement for public communication that relates to:

(1) Evidence regarding the occurrence or transaction involved.

(2) The character, credibility, or criminal record of a party, witness, or prospective witness.

(3) The performance or results of any examinations or tests or the refusal or failure of a party to submit to such.

(4) His opinion as to the merits of the claims or defenses of a party, except as required by law or administrative rule.

(5) Any other matter reasonably likely to interfere with a fair trial of the action."

Disciplinary Rule 7-107(F)
Code of Professional Responsibility
Oregon State Bar Association

The Oregon State Bar, an integrated Bar, is governed by a board of twelve elected from the membership in the various congressional districts. While charges against a member of the Bar are initiated by the Board of Governors, the proceedings before the trial committee of the Bar and the recommendation of the Board of Governors are reviewed *de novo* by the Supreme Court of the State of Oregon, which has exclusive jurisdiction to determine whether any rule of professional conduct has been violated and, if so, the form of discipline to be imposed.

The court found that the petitioner's statements would tend to prevent a fair trial. Petitioner's constitutional claim was found wanting by the court when weighed against the desirability of certain ethical considerations and restrictions which one embraces when he is admitted to the Bar.

Following the recommendation of the Board of Governors, the Supreme Court rendered a public reprimand in the form of its published opinion, which is printed in Appendix A to the petition herein, pp. 7-15.

ARGUMENTS IN OPPOSITION

1. A lawyer associated with a civil action is placed under certain restraints during the investigation and litigation of the action. These restraints on his rights of free speech are spelled out in DR7-107(F), *supra*, p. 2

The lawyer is forbidden to make any extra-judicial statements whatever for public communication if such statements relate to matters encompassed in sub-paragraphs 1 through 4 of DR7-107(F). It is not necessary that a finding be made that statements relating to the criminal record of a prospective witness, for example, are reasonably likely to interfere with a fair trial of the action; under the Oregon disciplinary rule, such statements can be presumed to be prejudicial to a fair trial.

Sub-paragraph 5 of DR7-107(F) prohibits extra-judicial statements for publication concerning "[a]ny other matter reasonably likely to interfere with a fair trial of the action." Thus, the rule seeks to reach areas beyond the specific scope of the first four sub-paragraphs by expanding the prohibition to any other matters related to a specific action which might reasonably have a prejudicial effect on the trial. The reason for the qualifying phrase "reasonably likely to interfere with a fair trial of the action" clearly is to restrict the rule's scope to matters related to the action concerned and to avoid inflicting needless restraints on lawyers.

Petitioner cites *In re Oliver*, 470 F2d 15 (7th Cir 1972), in support of his contention that the qualifying phrase contained in DR7-107(F) (5) should be read as applying to the rule in its entirety. Two distinctions may be made. First, Illinois Code of Professional Re-

sponsibility Disciplinary Rule 7-107(D), which was the rule under consideration in *Oliver*, relates only to the trial of criminal matters and not to the trial of a civil action. Second, the Illinois rule is far more general in its prohibition than is the Oregon rule. The Illinois rule prohibits lawyers for either the prosecution or the defense from "making an extra-judicial statement that a prudent lawyer would expect to be disseminated by means of public communication and that relates to the trial, parties, or issues in the trial or other matters that are reasonably likely to interfere with a fair trial," except as regards public records.

Additionally, respondent respectfully suggests that the Court of Appeals for the Seventh Circuit was in error when it read "reasonably likely to interfere with a fair trial" as referring to any phrase in the rule except "other matters." The construction of the sentence clearly indicates that the phrase "that are reasonably likely" modifies only "other matters" and not "trial" or "parties" or "issues in the trial."

The same sentence structure is found in Oregon's DR7-107(F) (5). "[R]easonably likely" modifies "[a]ny other matter"; it does not modify "evidence" or "character, credibility, or criminal record" or "results of any examinations or tests" or "opinion as to the merits."

Even if respondent's contention as to the meaning and application of the phrase in question is not accepted by this Court, the opinion of the Supreme Court of Oregon meets the requirements of *Oliver*. The Oregon Court stated, at petitioner's Appendix A 12:

> "It is our opinion that prejudice or unfairness is incapable of absolute proof and the only criterion that can be used is whether the published statements would tend to prevent a fair trial. We agree with the accused [petitioner herein] that the protection of the fairness of the trial is the principal purpose of the disciplinary rule. However, it is our conclusion that the statements made by the accused would tend to prevent a fair trial and that the accused's contention is not well taken."

Respondent submits that "reasonably likely to prevent a fair trial" and "would tend to prevent a fair trial" are more nearly synonymous than petitioner would have this Court find. The difference is one of semantics, not of substance. Things that are reasonably likely to occur are neither more nor less speculative than things which would tend to occur. Both are incapable of objective proof, since by definition neither must in fact occur for a violation of the disciplinary rule to take place. Thus, the Oregon court applied the correct standard to petitioner's conduct.

2. Petitioner asserts that his rights of free speech, equal protection and due process under the United States Constitution are violated by restrictions placed

upon him because of his chosen profession. Despite his contention, the fact remains that lawyers' conduct is regulated by rule and statute, whereas non-lawyers are under no similar restraints. Section 9.490, Oregon Revised Statutes, empowers the Board of Governors of the Oregon State Bar to "formulate rules of professional conduct" which, when adopted by the Supreme Court of the State of Oregon, become enforceable by the Board of Governors and "binding upon all members of the Bar."

Some of the rules thus promulgated place restrictions upon what lawyers may say or do in the course of representation of their clients. Lawyers are, first, officers of the court and, second, advocates; they owe a duty to the administration of justice which cannot be overshadowed by their duty to their clients. The rule in question is clearly intended to protect the integrity of the judicial process and to insure a fair trial by a jury that has not been prejudiced by reading or hearing the extra-judicial comments of lawyers involved in the case.

Petitioner contends that his statement regarding settlement on the eve of trial did not furnish the basis for a reprimand because he had no reason to believe the statement would be published, even though he made it to one reporter in the presence of another representative of the press. The rule does not require that the

lawyer making such a statement must know that it will in fact be published. Rather, as the Oregon court found here (petition, p. 14), a violation occurs when the statement is made "under circumstances from which he [the lawyer] could reasonably expect it would be disseminated to the public." The standard is objective rather than subjective.

3. The petition herein should not be granted for an additional reason: Unlike the accused in a proceeding which terminates in disbarment or suspension from the practice of law, the petitioner received only a reprimand. He has been deprived of no substantive rights by the action of the Supreme Court of the State of Oregon; the reprimand has been given, and the matter is closed.

CONCLUSION

No substantial federal question has been presented by petitioner, who is claiming, in effect, that lawyers should be held to no higher standard than lay persons when it comes to freedom to comment upon the evidence and the merits of a pending civil matter and the character of the adverse party. The Supreme Court of Oregon found that petitioner's conduct tended to interfere with a fair trial in violation of one of the disciplinary rules of the Code of Professional Responsibility of the Oregon State Bar.

The sanctions imposed against petitioner and all others members of the Bar are, in terms of inhibiting the right of free speech, inconsequential when weighed against the desirability of preserving a judicial system where the right to a fair trial is of primary importance.

The petition for a writ of certiorari should therefore be denied.

Respectfully submitted,
OREGON STATE BAR

By .....
William F. Frye
Counsel for Oregon State Bar
835 East Park Street
Eugene, Oregon 97401
Phone: (503) 345-3333